STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RONALD SERUYA OFFICER OF SERUYA'S SERVICE CENTER, LTD. DTA NO. 804931	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1980 through August 31, 1984.	:	

Petitioner Ronald Seruya, officer of Seruya's Service Center, Ltd., 33 Heath Avenue, Oakhurst, New Jersey 07755 filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1980 through August 31, 1984.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on March 28, 1989 at 9:15 A.M. and was continued before the same Administrative Law Judge at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 13, 1991 at 9:15 A.M., with all briefs to be submitted by November 13, 1991. Petitioner appeared by Sheldon Eisenberger, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether, pursuant to the provisions of Tax Law §§ 1131(1) and 1133(a), petitioner was a person required to collect sales and use taxes on behalf of Seruya's Service Center, Ltd. and, as such, was personally liable therefor.

II. If so, whether the Division of Taxation properly determined additional sales and use taxes due from Seruya's Service Center, Ltd. for the period at issue.

III. Whether the Division properly imposed a penalty for fraud pursuant to Tax Law §

1145(a)(2) or, in the alternative, whether the penalty under Tax Law § 1145(a)(1) should properly be imposed.

FINDINGS OF FACT

Pursuant to a field audit of Seruya's Service Center, Ltd. ("the Service Center"), the Division of Taxation issued to Ronald Seruya, officer of Seruya's Service Center, Ltd. ("petitioner"), on February 27, 1985, two notices of determination and demands for payment of sales and use taxes due as follows:

Notice No.	Period	Tax	Penalty	Interest	Total
S850227123C	3/1/80-8/31/83	$100,330.58	$51,165.28	$48,156.51	$199,652.37
S850227124C	9/1/83-8/31/84	17,693.37	8,896.68	1,834.06	28,424.11

Each of the notices of determination advised petitioner that he was personally liable as an officer of the Service Center for the taxes assessed thereon and, in addition, that fraud penalty of 50 percent of the amount of tax due was also being assessed.

The Service Center's accountant, Irwin Karpf, C.P.A., executed consents extending the period of limitation for assessment of sales and use taxes as follows:

Date Executed	Period	Date for Assessment
5/17/83	3/1/80-11/30/80	12/20/83
11/5/83	3/1/80- 5/31/81	6/20/84
6/2/84	3/1/80- 8/31/81	12/20/84
11/26/84	3/1/80- 2/28/82	6/20/85

It should be noted herein that the Service Center was also assessed in the identical amounts for the identical period. The Service Center, by its accountant, filed a petition for an administrative hearing and such hearing was also scheduled for March 28, 1989. At that time, no one appeared on behalf of the Service Center. Petitioner's representative, Sheldon Eisenberger, Esq., was advised that if he could obtain a power of attorney from the Service Center, no default order would be entered. Mr. Eisenberger subsequently advised that he was unable to obtain a power of attorney and, accordingly, on August 22, 1991, a default order was issued against the Service Center.

At a Bureau of Conciliation and Mediation Services conference held on September 14,

1987, petitioner presented evidence which indicated that the corporation changed hands on October 4, 1983. Therefore, the assessment for all periods after September 30, 1983 was cancelled. By a Conciliation Order dated November 6, 1987, the first notice of determination (Notice No. S850227123C) was sustained and the second notice of determination (Notice No. S850227124C) was reduced from $17,693.37 to $1,484.67 plus fraud penalty and statutory interest.

The audit commenced in March 1983. Surveys of the premises were performed on March 11 and June 20, 1983. Per observation, it was determined that there were three mechanics on duty. A letter was sent on March 11, 1983 to the Service Center's accountant, Irwin Karpf, requesting books and records for the period under audit (March 1, 1980 through November 30, 1982). The form letter, scheduling an appointment for April 27, 1983 (the meeting was adjourned to May 17, 1983), set forth 12 types of records requested. Of the 12, 7 were circled by the auditor and handwritten notations were made as follows:

Records	Notation
1. General Ledger	Audit Period
2. Cash Receipts Journal	Audit Period
3. Cash Disbursement Journal	Audit Period
4. Federal Income Tax Returns for Years:	1980 - 81 & 82
5. Sales tax returns and cancelled checks for Quarters Ended:	8/82 & 11/82
6. Purchase Invoices For:	to be determined
8. Expense Invoices For:	to be determined

The remaining records on this form were:

7. Sales invoices For:
9. All Fixed Asset Invoices For Fixed Assets Acquired During Audit Period
10. Guest Checks and Register Tapes For:
11. Resale, Exempt and Capital Improvement Certificates Supporting Non Taxable Sales For:
12. Other:

These numbered paragraphs contained no circled marks or any other indication that a request

was being made therefor.

Records produced were sales tax returns for the quarters at issue, Federal income tax returns for 1981, 1982 and 1983, depreciation schedules, cash receipts and cash disbursements journals, general ledger and bank statements including a check register and cancelled checks. No sales or purchase invoices, pump readouts, daily summaries or register tapes were provided.

A reconciliation of the Federal income tax returns, sales tax returns and available records was done and, by virtue thereof, the auditor determined that sales per sales tax returns were substantially underreported. The auditor determined that the Service Center's books and records were incomplete and inadequate for the performance of a detailed audit and, therefore, that it was necessary to resort to external indices to determine taxable sales for the audit period.

In order to determine gasoline sales, the Service Center's supplier, Mobil Oil Corp. ("Mobil"), was contacted to provide the Service Center's purchases of gasoline for the years 1981 and 1982.[1]

At the hearing, the auditor admitted that she computed quarterly taxable sales by initially adding together 353,500 gallons (1982) and 378,454 gallons (1981) when, in fact, the 378,454 figure represented purchases in dollars rather than the previous year's purchases in gallons. At the second hearing on June 13, 1991, a corrected computation (Exhibit "S") was submitted which, using gallons purchased in 1981 (401,991), would have resulted in greater quarterly taxable sales and, accordingly, a greater assessment of additional tax due. Since the corrected computation would, correspondingly, have increased the assessment, the auditor's initial computation will be utilized herein.

As previously indicated, the figures of 353,500 and 378,454 were combined (731,954)

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[1]The auditor testified that purchases for 1981 and 1982 were requested and that such figures were utilized to determine quarterly taxable sales. An examination of the audit report reveals that Mobil also provided purchase figures for 1980. While it is unclear why the 1980 purchases were not used in making this computation, it should be noted that the failure to factor in 1980 gasoline purchases (386,900 gallons) worked to the advantage of the taxpayer (the two-year average was 377,745.5 gallons; the three-year average was 380,797 gallons) so no adjustment shall be made herein.

and then divided by 24 months to arrive at 30,498 gallons per month. To determine quarterly purchases, 30,498 was multiplied by 3 months which totalled 91,494 gallons per quarter. The 91,494 gallons per quarter were then multiplied by $1.25 per gallon to arrive at $114,363.50

per quarter. The auditor testified that $1.25 per gallon was the average retail selling price of regular gasoline per an April 5, 1982 memorandum from the sales tax section of the District Office Audit Bureau (Exhibit "T"). It should be noted that the aforesaid memorandum set forth the average retail selling price of regular gasoline per quarter as follows:

Period Ending	Selling Price
5/31/79	85.8
8/31/79	102.9
11/30/79	106.3
2/28/80	124.3
5/31/80	127.6
8/31/80	128.9
11/30/80	127.2
2/28/81	142.9
5/31/81	141.4
8/31/81	138.8
11/30/81	138.4
2/28/82	135.3

The memorandum indicated that the above prices include State gasoline tax of .08¢, Federal gasoline tax of $.04¢ and sales tax.

During her observation of the premises on March 11, 1983, the auditor noted that the Service Center sold three grades of gasoline, regular-leaded, unleaded and unleaded-super which, on that date, sold for $1.199, $1.299 and $1.359, respectively. It is unclear from the record as to the reason for the across-the board application of $1.25 per gallon for all grades of gasoline for the period March 1, 1980 through August 31, 1982 (from September 1, 1982 through the remainder of the audit period, retail gasoline stations were no longer required to collect and remit sales tax on sales of gasoline).

To determine repair sales, the auditor, per her observation of the premises, used 3 mechanics x 8 hours per day x $30.00 per hour ($20.00 labor + $10.00 parts) x 6 days per week x 13 weeks per quarter which equaled $56,160.00 in repair sales per quarter. It must be noted

that on the gasoline station information sheet prepared for her observation of March 11, 1983, the auditor noted that there was one owner/mechanic. During the observation on June 20, 1983, her handwritten notes stated that there appeared to be three mechanics.

Sales of oil, like gasoline, were determined from information provided by Mobil regarding the Service Center's purchases. As was the case with gasoline purchases (see, Finding of Fact "5"), the auditor erroneously assumed that the figures provided by Mobil represented units purchased when, in fact, such figures were purchases in dollar amounts.

In her original computation, she assumed 1,236 units purchased in 1982 added to 5,239 units purchased in 1981 for a total of 6,475 divided by 24 months = 270 units per month x 3 months per quarter = 810 units per quarter x $6.00 per unit = $4,960.00 in oil sales per quarter. The $6.00 per unit was a figure which the auditor stated was derived from her experience in auditing other similar businesses.

In her recomputation (Exhibit "S"), utilizing the dollar amounts reported by Mobil for 1981 and 1982 ($3,548.00 for 1981 and $5,239.00 for 1982), she added the yearly figures together ($8,787.00) and divided by 8 (the number of quarters in the two-year period) to arrive at $1,098.00 in oil sales per quarter. Accordingly, quarterly oil sales are hereby reduced from $4,960.00 to $1,098.00.

The auditor recommended that fraud penalty be assessed based upon the Service Center's substantial underreporting of sales on its sales tax returns when compared to figures contained on its Federal income tax returns.

As indicated in Finding of Fact "6", the auditor's initial observation on March 11, 1983 indicated one owner/mechanic plus two gas attendants. The auditor testified that when she returned on June 20, 1983, an unidentified employee stated that there were two mechanics; however, she testified that she observed three men working on cars. Therefore, in calculating repair sales, she assumed that there were three mechanics on duty. She did not request payroll records in an attempt to verify the number of employees. The Federal income tax return indicated that the Service Center paid employee salaries of $13,660.00 for 1981 and $7,640.00

for 1982 which, the auditor admitted at the hearing, were rather small amounts for two or three full-time mechanics.

The auditor never met petitioner. She stated that she was told that he was the president. Her information sheet (contained within the audit report) indicates that Lawrence Seruya was the president and that Ronald Seruya was the secretary. The corporate power of attorney appointing Irwin Karpf, C.P.A. to represent the Service Center in the present matter was signed by Lawrence Seruya. The auditor never requested the Service Center's corporate books or bank authorizations to determine who were its responsible officers.

For each of the quarters from March 1, 1980 through February 28, 1983, the Service Center's sales tax returns were signed by Ronald Seruya and by Irwin Karpf, as preparer. The corporation's Federal income tax returns were signed solely by Irwin Karpf. Ronald Seruya's title, on most of the returns, was that of secretary, although some returns listed his title as vice-president or secretary-treasurer.

Petitioner began working at the Service Center (he was hired by his brother Lawrence Seruya) on a part-time basis in 1974 while he was still in high school. In 1980, he began working there on a more or less full-time basis.

Lawrence Seruya owned several other service stations in the New York City metropolitan area. Petitioner was hired to "take care of things" for his brother who was teaching him to be a mechanic. In 1980, his salary was approximately $300.00 to $325.00 per week. In 1981, his salary increased by about $20.00 per week. For the years in which he was employed at the Service Center, petitioner's sole income was the wages he earned from such employment. During his years of employment (from 1980 through April or May 1983), there were three other employees at the Service Center, Daniel Villy, Lloyd Austin and a part-time gas attendant. Daniel Villy was a gas attendant and Lloyd Austin assisted petitioner as a mechanic. The station was opened, by a gas attendant, prior to petitioner's reporting for work and remained open after his working hours concluded.

In late April or May 1983, petitioner's brother fired him due to a dispute over salary.

Petitioner never hired or fired any of the employees; all matters regarding employment were handled by Lawrence Seruya. Petitioner owned no shares in the corporation and, other than his salary, earned no other income from the business. All stock was owned by Lawrence Seruya who was also the sole officer and director of the corporation. Petitioner was told by his brother to sign the tax returns. His title, i.e., secretary, treasurer, vice-president, was filled in on the return by the corporation's accountant, Irwin Karpf, who prepared the sales tax returns and also prepared all checks for payment of taxes and other obligations. According to corporate records (Exhibit No. 5), Lawrence Seruya was the incorporator and was the sole officer and director of the Service Center. For convenience purposes (since Lawrence Seruya was only at the station on occasion), petitioner was given check-signing authority and was directed by Lawrence Seruya to sign the checks prepared by Irwin Karpf.

Gasoline was purchased from Mobil under the name Lawrence Seruya d/b/a Seruya's Service Center. All credit card adjustments from Mobil were issued to Lawrence Seruya. Equipment for the Service Center was purchased by Lawrence Seruya. Petitioner had no authority to make any of the above purchases.

Daniel Villy, who was employed at the Service Center from 1979 or 1980 through May 1983, testified that he was hired and fired by Lawrence Seruya who he stated was the "boss". Petitioner was the mechanic during this time. When Mr. Villy got out of the hospital in the spring of 1983, petitioner was no longer employed at the station. Inventory worksheets and shift reports were prepared daily (to show gas in and out and money collected) and were put in a drawer for the accountant who would collect the sheets when preparing tax returns. Mr. Villy stated that he was paid by checks signed by petitioner. He testified that the Service Center had one gas stand with three pumps (two hoses per pump). The station sold only regular and premium until 1982 or 1983 when it also began selling unleaded gasoline. Mr. Villy also testified as to his recollection of the prices charged for gasoline although such testimony was, at best, unclear. He also stated that more than 50 percent of the station's business was performed for religious organizations which would show exemption certificates at the time of purchase.

Both Mr. Villy and petitioner stated that the Service Center had a very small parts inventory.

On February 14, 1986, petitioner was indicted (Indictment No. 880-86) on seven counts of offering a false instrument for filing in the first degree (a Class E felony - Penal Law § 175.35). On March 19, 1986, petitioner entered a plea of guilty to three counts of attempted offering a false instrument for filing (a Class A misdemeanor - Penal Law §§ 175.35 and 110.05). On April 28, 1986, petitioner was sentenced to three years probation on each count, a fine of $3,000.00 ($1,000.00 on each count) plus restitution in the amount of $14,288.13 payable at a rate of $200.00 per month commencing May 1, 1986.

On May 6, 1989, petitioner signed an affidavit of confession of judgment which stated as follows:

> "I was the manager of a gas station known as Seruya Service Center, Ltd. located at 411 Empire Boulevard, Brooklyn, New York. During the period December 1, 1980 through August 31, 1982, the gas station purchased gasoline from Mobil Oil Company and sold that gasoline to the general public. During the aforementioned period of time, I, as manager of the gas station, signed and forwarded Sales Tax Returns to the Department of Taxation and Finance which I knew to contain inaccurate sales figures. As a result of the underreporting of these sales figures during the period mentioned above, I, as manager of the gas station, forwarded sales tax monies to the Department of Taxation and Finance in an amount $14,288.13 less than the true amount owed.
>
> "I agree to pay to the New York State Department of Taxation and Finance the sum of $200/month on the first day of each month until the above-mentioned total of $14,288.13 is remitted to New York State, pursuant to judgment entered in case no. 880/86 (S.Ct. N.Y.Co.)."

SUMMARY OF THE PARTIES' POSITIONS

The position of petitioner is as follows:

a. The assessment for periods after November 30, 1982 should be cancelled since the request for records was limited solely to a letter which indicated that the audit period was March 1, 1980 through November 30, 1982;

b. The auditor states that she requested but failed to receive sales and purchase invoices, daily summaries or register tapes and, by virtue thereof, she determined that the taxpayer's books and records were inadequate so that resorting to external indices was,

therefore, proper. Petitioner maintains that the only request for records, i.e. the letter of March 14, 1983 (see, Finding of Fact "4") did not request those records and that the auditor's finding of inadequacy of the taxpayer's records was, therefore, unfounded;

c. The $1.25 per gallon which was used by the auditor had no rational basis since both her observations, on two occasions, and the Division's own memorandum (see, Finding of Fact "5") indicate different prices for gasoline during the period at issue. In addition, no allowance was made for excise taxes included within the selling price of the gasoline. The $6.00 per unit of oil was also without a rational basis since it was apparently derived from limited audit experience;

d. No allowances for spillage or charge-backs were made. In addition, the testimony and other evidence presented at the hearing substantiate that repair sales were grossly exaggerated by the auditor, that the station was closed on many holidays and that most sales were made to exempt religious organizations;

e. The Division of Taxation has failed to sustain its burden of proof with respect to the imposition of fraud penalty pursuant to Tax Law § 1145(a)(2) since the testimony was uncontroverted that petitioner did not prepare the sales tax returns, but merely signed the returns at the direction of his brother which clearly indicates that he lacked the knowledge and intent to have deliberately failed to pay taxes due and owing to the State;

f. Based upon the testimony of Daniel Villy and Ronald Seruya, along with documentary evidence presented, it must be found that petitioner, Ronald Seruya, had neither the authority nor did he, in fact, exercise control over the financial matters of the corporation in order to be held as a responsible officer who, as such, was personally liable for the collection of sales and use taxes on behalf of the Service Center. While petitioner did plead guilty to three counts of offering a false instrument for filing, he did so because of a threat of imprisonment and his fear that the failure to do so would result in great financial cost in legal fees and fines. In addition, since the returns were, in fact, false and since he signed the returns, he felt responsibility therefor. However, such a plea, in light of the facts presented at the hearing, was

made despite the fact that there had been no intent to commit fraud. This is especially true because Ronald Seruya did not prepare the returns nor did he have any reason to risk civil or criminal penalties since he was little more than a salaried employee. Petitioner also believed that the extent of his civil liability was the restitution of the $14,288.13 agreed to since such restitution was allegedly based upon an audit wherein purchases from Mobil were compared to sales reported on the sales tax returns;

g. Upon receiving notification of this assessment, petitioner contacted both the Service Center's accountant, Irwin Karpf, and his brother, Lawrence Seruya, in an attempt to obtain daily summaries and pump readings and other relevant records. Lawrence Seruya was totally uncooperative. Irwin Karpf stated that he no longer had any records and advised petitioner to go to the station and check with the new owner (Ben Gohar, who purchased the corporate shares from Lawrence Seruya on October 4, 1983) to see if any records existed. The only records found were an inventory worksheet and shift report, a Mobil load ticket from dates prior to the audit period and some invoices from Mobil from March and April 1982. Petitioner and Daniel Villy maintain that records such as the inventory worksheet and shift report (Exhibit No. "2") were maintained on a daily basis and then put in a drawer for collection by Irwin Karpf. However, petitioner stated that Mr. Karpf furnished none of these records to petitioner upon his request therefor.

The Division of Taxation's position may be summarized as follows:

a. Based upon the reduction resulting from the auditor's erroneous interpretation of the Mobil printouts with respect to purchases of oil/oil sales were reduced from $4,960.00 to $1,098.00 (see, Finding of Fact "7"), quarterly sales, for the first ten quarters of the audit period should be reduced from $175,388.00 to $171,621.00;

b. Petitioner's signature on the returns as an officer, his check-signing authority, his position at the station and his plea of guilty to criminal charges arising out of the filing of false returns (wherein he signed a sworn statement describing himself as manager of the station) provide sufficient evidence to determine that petitioner was a responsible officer of the Service

Center;

c. Petitioner's testimony and the exhibits presented are totally insufficient to establish that exempt sales took place or to establish the amounts thereof;

d. A plea of guilty to tax evasion collectively estops petitioner from contesting a civil fraud penalty for the same periods; and

e. Federal excise tax was properly included in receipts subject to sales tax (see, 20 NYCRR 526.5[b][1][ii]).

CONCLUSIONS OF LAW

A. The first issue to be determined herein is whether or not petitioner was a "responsible officer" under Articles 28 and 29 of the Tax Law. To make such determination, one must look to Tax Law §§ 1131(1) and 1133(a). Section 1131(1) provides, in pertinent part, that any officer, director or employee of a corporation who is under a duty to act for such corporation in complying with any requirement of Article 28 of the Tax Law is also responsible for collecting and paying over taxes due and owing from the corporation. Section 1133(a) holds that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

In Matter of Taylor (Tax Appeals Tribunal, October 24, 1991), the Tribunal stated:

> "A study of the relevant case law suggests consideration of the following indicia of responsibility in a 'responsible officer' determination: status as an officer, director, or stockholder (Matter of Cohen v. State Tax Commn., supra, 513 NYS2d 564, 565); the derivation of substantial income from the corporation or stock ownership (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536); day-to-day responsibilities, involvement with and knowledge of the financial affairs and management of the corporation, as well as the individual's duties and functions set forth in the certificate of incorporation and bylaws (Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d 862, 865); ability to hire and fire employees (Chevlowe v. Koerner, supra, 407 NYS2d 427, 429); and authorization to sign the corporate tax returns and checks (Matter of Cohen v. State Tax Commn., supra, Chevlowe v. Koerner, supra, 407 NYS2d 427, 429)."

An analysis of the facts presented herein, in light of the above factors, reveals the following:

(1) Petitioner was neither an officer, director nor stockholder of the corporation;

(2) Other than his salary from his employment at the Service Center, petitioner received no income, profits or other benefits from the corporation;

(3) Petitioner's duties at the Service Center were to repair vehicles, i.e., he was the mechanic. He had no authority to make purchases on behalf of the corporation nor did he have responsibilities or involvement with the financial affairs of the Service Center. While he may have had some supervisory responsibilities over the assistant mechanic, Lloyd Austin, petitioner's sole decision-making functions related to his duties as a mechanic;

(4) Petitioner had no authority to nor did he hire or fire any of the Service Center's employees. As was the case with all of the employees, he was hired and fired by the sole officer, director and shareholder of the corporation, Lawrence Seruya; and

(5) Because Lawrence Seruya owned several other gas stations and was, therefore, not present at the Service Center on a daily basis, he gave check-signing authority to petitioner, his brother. Petitioner signed sales tax returns and checks (sales tax payments and payroll), all of which were prepared by the accountant, Irwin Karpf. Petitioner had no knowledge of or control over the contents of the returns nor did he make any decisions regarding the amounts of the salaries paid to himself or to the other employees.

B. Clearly, while the aforesaid factual determinations lead to the conclusion that petitioner was not a person responsible for the collection and paying over of sales and use taxes on behalf of the Service Center, an important factor which must also be considered is petitioner's plea of guilty to three counts of attempted offering a false instrument for filing. In an affidavit of confession of judgment (see, Finding of Fact "13"), he admitted that he was the manager of the Service Center and that, during the period December 1, 1980 through August 31, 1982, he signed and forwarded sales tax returns which he knew to contain inaccurate sales figures and that he forwarded sales tax monies in an amount which was $14,288.13 less than the true amount owed.

Citing Federal case law, the Tax Appeals Tribunal has considered the effect of a plea of guilty to criminal charges on the imposition of the civil fraud penalty when, in Matter of Cinelli

(Tax Appeals Tribunal, September 14, 1989), it stated as follows:

> "Finally, the petitioner's plea of guilty to the criminal charge of filing a false instrument - the sales tax return - weighs heavily against him. Although the petitioner is collaterally estopped from contesting the civil fraud penalty only for that period to which he entered a plea of guilty to the criminal charge (see, Plunkett v. Commr., 465 F2d 299 [7th Cir 1972]), the plea of guilty and the statement offered with this plea are evidence of fraudulent intent for the entire period of assessment (see, Edrie Boyer Costine v. Commr., 14 T.C.M. [CC4] 34 [1955])."

Based upon the foregoing, were the sole issue to be decided herein whether the civil fraud penalty was properly imposed by the Division, there is little doubt that petitioner would be collaterally estopped from contesting this penalty. However, prior to considering the propriety of the amount of the assessment and related penalties imposed thereon, what must first be determined is whether or not petitioner was the person properly assessed for the sales tax liabilities of the Service Center. It having previously been concluded (see, Conclusion of Law "A") that petitioner did not meet the Tribunal's criteria for being held to be a "responsible officer", what must be examined next is the effect on such conclusion of his plea of guilty to criminal charges, i.e., whether, as a result thereof, he is also collaterally estopped from contesting the Division's determination that he was personally liable for the sales taxes of the Service Center.

C. In essence, "collateral estoppel" prevents a party from relitigating an issue that that party previously litigated unsuccessfully in a different action (Meier v. Commissioner, 91 TC 273, 283). That being so, the Tax Court has held that a taxpayer is not barred by the rule of collateral estoppel from litigating in the civil tax trial a legal or factual issue not essential or needed for the conviction in the criminal case (Blanton v. Commissioner, 94 TC 491). This rule applies also to cases where the conviction was based on the taxpayer entering a plea of guilty (United States v. Abbott, 75-1 USTC ¶ 9440 [Cent D Cal]).

In Starker v. United States (602 F2d 1341, 79-2 USTC ¶ 9541), the court set forth the factors which are relevant to determining whether the issues in two different cases are the same:

> "(1) Was there a substantial overlap between the evidence or argument advanced in the second proceeding and that advanced in the first?

"(2) Does the new evidence or argument involve the application of the same rule of law as that involved in the prior proceeding?

"(3) Could pretrial preparation and discovery in the first proceeding reasonably be expected to have embraced the matter to be presented in the second?

"(4) How closely related are the claims?"

D. Absent a plea of guilty to the criminal charges, the Division of Taxation, in order to sustain the civil fraud penalty, would have the burden of proof to provide clear and convincing evidence of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing (Matter of Schutt, State Tax Commn., July 13, 1982). Petitioner's plea of guilty eliminated the necessity of such proof (see, Conclusion of Law "B").

However, sustaining the aforementioned burden of proof could be accomplished without the need to prove that the person was a "responsible officer", i.e., it would not be necessary to prove that, by virtue of the indicia of responsibility set forth in Conclusion of Law "A", he was under a duty to act for the corporation in complying with the requirements of Article 28 of the Tax Law. This record contains only the certificate of conviction (Exhibit "N") and the affidavit of confession of judgment (Exhibit "M") and, of course, no trial transcript. Therefore, it cannot be held that the "responsible officer" issue had ever been litigated. In a matter involving the effect of a bankruptcy court's prior decision on the Division of Taxation's claims for withholding tax penalty, the Tribunal, in Matter of Planit (Tax Appeals Tribunal, February 7, 1991) stated:

"There is nothing in the record to indicate that any factual issues related to the validity of the claims had actually been litigated or determined in the prior proceeding. This State's highest court had consistently held that 'an issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation' (Kaufman v. Eli Lilly & Co., [65 NY2d 449], 492 NYS2d 584, 589, citing Restatement [Second] of Judgments § 27 comments d, e, at 255-257; see, Matter of Halyalkar v. Board of Regents of State of New York, 72 NY2d 261, 532 NYS2d 85, 88). Where, as here, the issue has not been litigated at all, there can be no identity of issues between the present action and the prior determination (Matter of Halyalkar v. Board of Regents of State of New York, supra; Kaufman v. Lilly & Co., supra)."

Clearly, therefore, since there is no indication that petitioner's "responsible officer" status

was ever litigated in the Supreme Court, County of New York, he is not collaterally estopped from litigating such issue before the Division of Tax Appeals.

E. As indicated in Finding of Fact "13", petitioner, in his affidavit of confession of judgment relative to his plea of guilty to three counts of attempted offering a false instrument for filing, stated that he was the manager of the Service Center and that, during the period December 1, 1980 through August 31, 1982, he signed and forwarded sales tax returns which he knew to contain inaccurate sales figures resulting in an underpayment of sales tax in the amount of $14,288.13.

In Matter of Roncolato (Tax Appeals Tribunal, August 15, 1991), the Tribunal, in discussing the factors relevant to classifying a "person required to collect tax" for purposes of Tax Law §§ 1131(1) and 1133(a), drew an analogy to the approach taken by the Federal courts when determining whether a person is a responsible officer for purposes of collecting Federal withholding tax and stated:

> "In determining whether there is a 'duty to perform the act in respect to which the violation occurs,' a requirement for imposing liability is that the person possesses the authority to see that the taxes withheld from the various sources are remitted to the Government (Internal Revenue Code §§ 6671, 6672 [emphasis added]; Monday v. United States, 421 F2d 1210, 70-1 USTC ¶ 9205 [7th Cir]; cert denied 400 US 821, 27 L Ed 2d 48; Harrington v. United States, 504 F2d 1306, ¶ 9772 [1st Cir])."

Certainly, title alone does not confer such authority since the Tribunal has held that, in certain circumstances, one who is an officer, director and shareholder and who receives a salary dependent, in significant part, on the corporation's earnings may not be a "person required to collect tax" (Matter of Roncolato, supra; see also, Matter of Taylor, Tax Appeals Tribunal, October 24, 1991).

While, in the present matter, petitioner admitted that he signed and forwarded returns which he knew were inaccurate, other relevant factors (see, Conclusion of Law "A") taken together with the circumstances of his guilty plea, lead to the conclusion that he did not have the authority to see to it that proper sales tax was remitted to the State. He did not prepare the returns or the checks in payment of sales tax owed; he signed the returns and checks at the

request of his brother, Lawrence Seruya, and the accountant, Irwin Karpf. Out of fear of extensive legal costs (he testified that he had little money to pay those costs) and imprisonment for a conviction on felony counts, petitioner entered a plea of guilty to reduced charges and, believing that the $14,288.13 represented his total liability, he agreed to make restitution in that amount. Petitioner may not, therefore, be held personally liable for sales and use taxes of Seruya's Service Center, Ltd.

F. By virtue of Conclusion of Law "E", Issues II and III are hereby rendered moot.

G. The petition of Ronald Seruya, officer of Seruya's Service Center, Ltd. is granted and the notices of determination and demands for payment of sales and use taxes due issued to such petitioner on February 27, 1985 are hereby cancelled.

DATED: Troy, New York
October 8, 1992

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE